Supreme Court, U.S.
FILED
JUN 14 2001
CLERK

No. 00-1685

IN THE

Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Oklahoma

PETITIONERS' CONSOLIDATED REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MaryGaye LeBoeuf
6704 Parkwood Lane
Oklahoma City, Oklahoma 73132
Telephone: (405)728-9925

Counsel for Petitioners

June 14, 2001

13 pp

TABLE OF CONTENTS

INTRODUCTION ..... -1-

I. THE ISSUE OF DUE PROCESS WAS PROPERLY PRESERVED FOR REVIEW BY THIS COURT ON A WRIT OF CERTIORARI ..... -1-

A. The Issue of Due Process Has Been Adequately Preserved for Review. ..... -3-

II. IT IS NOT NECESSARY TO RAISE AN ISSUE IN A PETITION FOR REHEARING IN THE STATE COURT IN ORDER TO PRESERVE THAT ISSUE FOR PURPOSES OF CERTIORARI IN THE UNITED STATES SUPREME COURT. ..... -7-

III. PETITIONERS' HAVE AN INTEREST IN THE SUBJECT MATTER OF THE QUI TAM THAT IS PROTECTED BY THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS. ..... -8-

TABLE OF AUTHORITIES

FEDERAL CASES

Bankers Life and Casualty Company v. Crenshaw, 486 U.S. 71 (1988) ..... -8-

Chambers v. Mississippi, 410 U.S. 284 (1973) ..... -2-

Chapman v. Goodnow's Admr., 123 U.S. 540 (1887) ... -3-

Crampton v. Zabrinskie, 100 U.S. 601 (1879) ..... -9-

Davis v. O'Hara, 266 U.S. 314, 321 (1924) ..... -2-

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) ..... -1-

Hansberry v. Lee, 311 U.S. 31 (1940) ..... -6-

Hathorn v. Lovorn, 457 U.S. 255 (1982) ..... -2-

Reece v. Georgia, 350 U.S. 85 (1955) ..... -2-

United States v. Denver & Rio Grande R. Co., 191 U.S. 84 (1903) ..... -2-

Ward v. Board of County Commissioners of Love County Oklahoma, 253 U.S. 17 (1920) ..... -3-

STATE CASES

Eastern Missouri Laborers Dist. Council v. St. Louis County, 781 S.W.2d 43 (Mo.1989) ..... -10-

National Waste Recyc., Inc. v. Middlesex County Improv. Auth., 150 N.J. 209, 695 A.2d 1381 (1997) ..... -10-

School District of Greenville County, 537 S.E.2d 299 (S.C. App. 2000) ..... -9-, -10-

Torres v. Kansas City Fire and Marine Insurance Company, 849 P.2d 407 (Okla. 1993) ..... -7-

INTRODUCTION

Petitioners, Moshe Tal, and Taxpayers Against Ripoffs, a group of ten or more taxpayers in Oklahoma City, Oklahoma, ("Taxpayers" "Petitioners") submit this Reply Brief to respond to certain authorities and arguments presented in the Respondents', The City of Oklahoma City and Related Parties, Torchmark Corporation, the Hogan Respondents, OCURA, Oklahoma Gas and Electric Company, and The Benham Group (collectively "Respondents"), Briefs in Opposition to the Petition for Writ of Certiorari ("Briefs in Opposition" "Respondents' Briefs"). This Reply only addresses the issues raised in the Respondents' Briefs which the Petitioners believe are important to this Court's decision to grant certiorari.

Petitioners would ask the Court to note that Petitioners believe that each of the Respondents' Briefs in Opposition contain inaccurate and incorrect statements of law and fact. Most of these misstatements are not critical to this Court's decision to grant certiorari and, without waiving any right to address these misstatements in the future, the Petitioners will not respond to these misstatements at the present time. However, the correct statements of fact and law are contained in the Record below, and, if this Court deems it prudent or necessary, the Petitioners will be happy to file a separate brief and appendix pointing out and correcting the Respondents' misstatements.

I.

THE ISSUE OF DUE PROCESS WAS PROPERLY PRESERVED FOR REVIEW BY THIS COURT ON A WRIT OF CERTIORARI

When a state's highest court has failed to expressly pass upon a federal question, it is assumed that the omission was due to a failure to properly present the federal question in the state courts, unless the petitioner in the United States Supreme Court can affirmatively show to the contrary. *Exxon Corp. v.*

Eagerton, 462 U.S. 176, 181 (1983)(*citations omitted)*. However, if it is clear from the record that the federal issue was raised before the trial court by appropriate motions and arguments, and was argued in briefs before the state's intermediate and highest appellate courts, the federal question can then be considered by the Supreme Court, despite the lack of a definitive ruling on the issue by the state's highest court. *Chambers v. Mississippi,* 410 U.S. 284, 289-90 (1973).

It has long been the rule that this Court has the "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . .and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. . . ." *Hathorn v. Lovorn*, 457 U.S. 255, 261 (1982)(*citing Reece v. Georgia*, 350 U.S. 85, 87, 76 S.Ct. 167, 169, 100 L.Ed. 77 (1955); *See also Davis v. O'Hara*, 266 U.S. 314, 321, 45 S.Ct. 104, 107, 69 L.Ed. 303 (1924); *United States v. Denver & Rio Grande R. Co.*, 191 U.S. 84, 93, 24 S.Ct. 33, 86, 48 L.Ed. 106 (1903). "Because we cannot review a state court judgment until it is final, a contrary rule would insulate interlocutory state court rulings on important federal questions from our consideration. *Hathorn v. Lovorn*, 457 U.S. at 261.

Where the failure to address a federal issue in a decision arises out of a desire to create the appearance of independent and adequate state grounds for the decision and avoid the federal matters, this Court will look beyond the stated reasons for the decision and address the federal issues.

> We are aware that a right or immunity set up or claimed under the constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right * * * as if it had

> been specifically referred to and the right directly refused."

Chapman v. Goodnow's Admr., 123 U.S. 540, 548 (1887); *see also, Ward v. Board of County Commissioners of Love County Oklahoma*, 253 U.S. 17, 22-23 (1920)(discussing the power of this Court to reject state grounds that lack fair or substantial support, for without that power this Court's power to review might be easily avoided).

A. <u>The Issue of Due Process Has Been Adequately Preserved for Review</u>.

The Oklahoma Supreme Court failed to expressly pass on the issue of due process in its Opinion in *Tal III*. However, the Petitioners have affirmatively shown that the omission was not due to a failure to properly present the federal question in the state courts. The Record shows that the issue of due process was appropriately raised, briefed and argued in the district court and in the appellate court. See *Plaintiffs' Brief in Opposition To Defendants' Motions To Dismiss*, Proposition II and III, Appendix to Reply (filed herewith) pp. 34-41 (*Tal III*, Appeal Record Document 9). Similarly, in *Tal I* the Oklahoma Supreme Court fails to make clear that the basis for its decision arises out of a finding of adequate representation for purposes of intervention of right. As in *Tal III*, the record in *Tal I* shows the premises upon which the Taxpayers were denied intervention.

In each of the Respondents' Briefs in Opposition to the Petition for Certiorari the Respondents claim that the basis for the decision in *Tal I* and *Tal III* was standing and not, respectively, adequacy of representation for purposes of intervention of right and res judicata on that issue. With these arguments the Respondents are attempting to bootstrap the adequate representation requirement for intervention of right to the requirements under the Oklahoma qui tam statute. Nothing in the Oklahoma qui tam statute addresses adequate representation. See Oklahoma Qui Tam Statutes, Appendix to Petition For Writ of Certiorari, pp. 44-45. By superimposing the

adequate representation requirement to the qui tam statute, the Respondents hope to create the appearance that the decision in *Tal III* is based on state law and is not reviewable by this Court.[1]

---

[1] In Proposition 5 of its Response, the City contends that the other issues raised in their Motion to Dismiss, provide independent state grounds for the dismissal of the Taxpayers' action. There is nothing in the record to support that contention. The district court order does not specify the grounds for dismissing the action. However, the Respondents' all moved to dismiss the qui tam on the grounds of res judicata. See Hogan Respondents' Consolidated Reply to Plaintiffs' Brief in Opposition to Motion To Dismiss - Appendix to Reply, pp. 2,-4, 7-13. Also See, *Tal III* Appeal Record Document 2: Oklahoma City Urban Renewal's Motion to Dismiss, pp. 18-23; *Tal III* Appeal Record Document 3: City of Oklahoma City's Motion to Dismiss, pp. 12-14; *Tal III* Appeal Record Document 4: Motion to Dismiss of Defendants' TMK/Hogan, Hogan Property Management, L.L.C., and Dan Randolph Hogan, pp. 3- 4, and 9-10; *Tal III* Appeal Record Document 5: Motion To Dismiss of Defendant Bricktown-TMK/Hogan Parking, L.L.C., pp. 3-4, and 8-9; *Tal III* Appeal Record 6: Motion to Dismiss of Defendant BAP-Bricktown, L.L.C., pp. 1, 3-4, and 8-9; *Tal III* Appeal Record 7: Motion to Dismiss of Defendant OKC Athletic Club L.P., pp. 1, 3-4, and 8-9 (Note: The contents of Appeal Record Documents 4-7 [Motions to Dismiss of various different parties] are almost identical and were written by the one law firm representing these various defendants); and *Tal III* Appeal Record Document 8: Motion to Dismiss of Defendants Bricktown Parking Investors, L.L.C. and Bricktown TMK/Hogan Entertainment, L.L.C., pp. 5-6,9, and 11-14. Also See *Tal III* Appeal Record Document 10: OCURA's Reply Brief to Plaintiffs' Opposition to Defendants' Motion to Dismiss, pp. 2-3. The Petitioners' responded to the claim of res judicata and claimed that such a bar would violate their right to due process. See Plaintiffs' Brief In Opposition to Defendants' Motion To Dismiss - Appendix, pp. 34-35, 37,41 and 43. After the court dismissed the qui tam, all of the post-dismissal hearings and pleadings, including the motions for sanctions and answers, motions for attorney's fees and answers, appellate briefs relating to sanctions and attorney's fees on appeal, appellate briefs on the appeal of the denial of sanctions, as well as

The Oklahoma qui tam statutes do not provide that Taxpayers do not have standing to bring a qui tam action so long as they are adequately represented. Petitioners' Appendix to Petition For Writ of Certiorari, pp. 44-45. The reference to adequate representation in *Tal I* and *Tal III* arises out of the rule that a party may not intervene in an action as a matter of right so long as that party's interests are being adequately represented. Thus, the holding in *Tal I* that the Taxpayers did not have "standing to intervene" because they were being "adequately represented." *Tal I* Opinion, Petitioners' Appendix to Petition For Writ of Certiorari pp. 17-31(Conclusion, p. 31). Similarly, the decision in *Tal III*, found that the ruling on adequate representation in *Tal I* barred the Taxpayers from obtaining standing to bring a qui tam after the City had ostensibly brought an action on the Taxpayers' behalf. *Tal III* Opinion, Petitioners' Appendix to Petition For Writ of Certiorari, p. 8.

Moreover the failure of the Oklahoma Supreme Court to expressly reference intervention of right in the decision in *Tal I* and res judicata on the issue of adequacy of representation as the basis for the decision in *Tal III* does not preclude this Court from granting certiorari.

In both *Tal I* and *Tal III*, the federal issues and the state law issues giving rise to the federal issues that are now presented to this Court, were adequately preserved so that this Court may review the decision in *Tal III*.[2]

---

the parties and the district court have addressed and proceeded on the premise that the Taxpayers' qui tam was dismissed because it was barred by res judicata and not any of the other grounds raised in the City's or other defendants' motions to dismiss.

[2] The Hogan Respondents claim that the Taxpayers are out of time to appeal *Tal I*. The time to appeal is not relevant as Taxpayers are not seeking certiorari to review that decision, they are seeking a grant of certiorari to review the opinion in *Tal III* and that Petition for Certiorari was timely filed on May 7, 2001.

A reading of *Tal I* and a review of the underlying record shows that the district court denied Taxpayers' motion to intervene as a matter of right on the grounds that the Taxpayers' rights were being adequately represented. In the District Court the Taxpayers moved for intervention of right and permissive intervention. Petitioners' Appendix to Petition For Writ of Certiorari pp. 49-53. Taxpayers raised denial of intervention of right in their petition in error and throughly briefed that issue in their Petition for Rehearing. *Tal I* Appeal Record - Appellants' Petition for Rehearing, pp. 6-14. The Oklahoma Supreme Court affirmed the district court's dismissal on the grounds that the Taxpayers lacked standing to intervene because their rights were adequately represented.

In *Tal III*, the court held that the decision in *Tal I*, deciding that the Taxpayers were adequately represented and did not have standing to intervene in the City's Declaratory Judgment Action, barred the Taxpayers from challenging the adequacy of representation and the binding effect of the judgment under *Hansberry v. Lee*, 311 U.S. 31 (1940). The res judicata and due process issues giving rise to the federal issues asserted on certiorari were all properly raised, briefed and argued in both the district and appellate court.

The City, Urban Renewal and the Hogan Respondents all moved to dismiss the action on the grounds that *Tal I* was res judicata and barred the Taxpayers bringing the qui tam in *Tal III*. *Tal III* Appeal Record Documents 2-8, and 10-12.

In the Taxpayers brief in opposition to the motion to dismiss, the primary focus was that it was a violation of due process under the Fourteenth Amendment to hold that their claim was barred by res judicata. The Taxpayers also asserted that the denial of intervention was not res judicata and did not bar the Taxpayers bringing the qui tam

The Taxpayers claimed that they had a constitutional right under *Hansberry v. Lee* and progeny to challenge the binding effect of the judgment in the City's Declaratory Judgment Action. The Taxpayers also asserted that under *Hansberry v.*

Lee, 311 U.S. 31 the decision in *Tal I* was not binding upon them and did not prevent their bring the qui tam.

In their Reply Briefs, the City and the Hogan Defendants devoted significant portions of their briefs to arguing the different reasons why the Taxpayers did not have a right to due process or that their right to due process would not be violated by holding that the qui tam was barred by *Tal I*. Taxpayers' Brief in Opposition to Motion To Dismiss, Appendix, pp. 17-50.

The violation of Taxpayers' due process rights by the application of res judicata was expressly raised, briefed and necessarily considered by the court, in both the district court and the Oklahoma Supreme Court. The mere fact that the Oklahoma Supreme Court did not mention the due process issue in its opinion does not insulate that issue from appeal to this Court.

II.

IT IS NOT NECESSARY TO RAISE AN ISSUE IN A PETITION FOR REHEARING IN THE STATE COURT IN ORDER TO PRESERVE THAT ISSUE FOR PURPOSES OF CERTIORARI IN THE UNITED STATES SUPREME COURT.

There is nothing in this Court's Rules, the Federal Rules or in State Rules that restricts the issues raised in a petition for certiorari to those issues raised in a petition for rehearing in the state appellate court. To the contrary, in Oklahoma it is held that where an issue was raised in the petition in error and was briefed by the appellant, the issue is properly asserted on certiorari even though the issue was not raised in the petitioner's motion for rehearing. *Torres v. Kansas City Fire and Marine Insurance Company*, 849 P.2d 407, 413 fn. 7 (Okla. 1993). Moreover, the authority cited in Section I, *supra*, makes it clear that this Court can consider federal issues raised at anytime during the state court proceedings. Nothing in those cases indicates that the issues raised in a petition for certiorari

are limited to the issues raised in a petition for rehearing before the state appellate court.

The City has afforded no authority to the contrary. The City cites *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71 (1988) to support its claim that the Taxpayers have waived their right to appeal the issue of due process by not raising it in their motion for rehearing filed in the Oklahoma Supreme Court. The City contends that *Bankers Life* holds that this Court will not consider an issue on certiorari where that issue was not clearly raised in a petition for rehearing. This was not the holding, nor can such a conclusion be extrapolated from the decision in *Bankers*.

In *Bankers*, this Court refused to consider the issue because the issue was raised for the *first* time in a motion for rehearing and, even then, the issue was not clearly raised. *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. at 79 (*emphasis added*). It was not, as claimed by the City, because the issue was not adequately raised in the petition for rehearing that this Court rejected its assertion on certiorari. Thus, nothing in *Bankers* supports the City's claim of waiver.

The City's contention that the Taxpayers' failure to raise due process in the petition for rehearing waives the issue for review in this Court is without support in fact or law.

III.

PETITIONERS' HAVE AN INTEREST IN THE SUBJECT MATTER OF THE QUI TAM THAT IS PROTECTED BY THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS.[3]

---

[3] The Respondents all argue that the Taxpayers were afforded the right to be heard and participated in the City's Declaratory Judgment Action through their motion to intervene, their depositions and their written demand. According to the Respondents, the Taxpayers' opportunity to be heard satisfied the

The City, the Hogan Respondents and Torchmark argue that the Taxpayers have no right or interest in the subject of the qui tam litigation that would afford them the right to due process. They claim that the right to bring a qui tam is purely a creature of statute and there are no taxpayer interests underlying the right to bring a qui tam to enjoin the improper expenditure of taxpayers funds. This contention is without merit.

Taxpayers have a direct interest in the proper use and allocation of tax receipts by government officials. Taxpayers have a personal stake in the subject matter of a lawsuit to recover for the unlawful expenditure of tax receipts. *Sloan v. School District of Greenville County*, 537 S.E.2d 299, 301 (S.C. App. 2000). "[M]unicipal taxpayer standing has ancient roots in our jurisprudence." *Sloan v. School District of Greenville County*, 537 S.E.2d at 302 fn3 (*quoting United States v. City of New York*, 972 F.2d 464, 470). "The right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county. . . there is at this day no serious question." *Sloan* at 301 (*citing Crampton v. Zabrinskie*, 100 U.S. 601, 609 (1879).

"The primary basis for taxpayer suits arises from the

---

tenets of due process. This argument is disingenuous at best. However, whether the Taxpayers had a meaningful opportunity to be heard is a collateral issue and is not involved in deciding whether to grant certiorari. Whether Taxpayers had an opportunity to be heard only comes into consideration after the Taxpayers are allowed to challenge the binding effect of the judgment under *Hansberry v. Lee*. Thus, Taxpayers will not burden this Courts' resources with a presentation of authority and argument regarding what process was due the Taxpayers i..e. opportunity to confront and cross examine witnesses, to present their testimony and case orally rather than through writings, and the propriety of using the Taxpayers' depositions, without a showing that the deponents were unavailable for trial, in order to satisfy the requirement that they have a meaningful opportunity to be heard.

need to ensure that governmental officials conform to the law. It rests upon the indispensable need to keep public corporations, their officers, agents and servants strictly within the limits of their obligations and faithful to the service of the citizens and taxpayers." *Eastern Missouri Laborers Dist. Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo.1989)(citation omitted)); *see also National Waste Recyc., Inc. v. Middlesex County Improv. Auth.*, 150 N.J. 209, 695 A.2d 1381, 1387 (1997)

The Taxpayers' interest and right to sue to restrain the misuse of taxpayer monies is "rooted in the ancient jurisprudence" of this country. It is not a mere creature of statute as claimed by the Respondents. Because the Taxpayers' have a protected property interest in the taxpayer funds used by the City, the Taxpayers have a right to sue to enjoin the misuse of taxpayer monies and that right is protected by the requirements of due process.

CONCLUSION

For the reasons expressed in the Taxpayers' Petition for a Writ of Certiorari and in this Reply Brief, Taxpayers believe that this Court may properly grant Certiorari to hear the appeal on the denial of Taxpayers' right to due process.

Respectfully submitted,

MaryGaye LeBoeuf
6704 Parkwood Lane
Oklahoma City, Oklahoma 73132
Telephone: (405)728-9925
Counsel for Petitioners